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Ein cyf/Our ref MA-L/JM/0382/19

Lynne Neagle AM
Chair
Children, Young People and Education Committee
National Assembly for Wales
Ty Hywel
Cardiff Bay
Cardiff
CF99 1NA

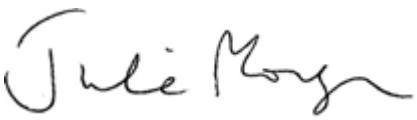
25 April 2019

Dear Lynne,

Thank you for your letter of 5 April, which requested clarification on specific points of interest in relation to the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill.

I trust the Committee will find the information provided in the Annex to this letter helpful. I look forward to discussing how the Bill will protect children's rights with the Committee on 2 May.

Yours sincerely,



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Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill

ANNEX

Assault and battery

"At various points in the Explanatory Memorandum (e.g. para 1.1. and para 1.4) it is stated that the Bill removes the defence of reasonable punishment as a defence to assault or battery against a child. Section 1 of the Bill removes the defence of reasonable punishment in relation to corporal punishment of a child by parents or those acting in loco parentis. Corporal punishment is defined in section 1 (5) of the Bill to mean battery carried out as a punishment. Can you confirm how the defence is removed in cases of assault?"

The approach taken in the Bill is consistent with what was done in relation to corporal punishment in schools by section 548 of the Education Act 1996. We are not aware of any suggestion or concern that section 548 left open the possibility of teachers being able to defend threats to carry out corporal punishment against pupils as lawful.

For an assault to occur, a person must apprehend the immediate infliction of unlawful violence or force. It follows that the apprehension of the immediate infliction of *lawful* force is not an assault (anticipating a collision in a game of rugby, for example; where consent to participation renders the contact lawful). Any action which currently causes a child to apprehend the infliction of a smack, for example, is potentially defensible, and lawful, by reference to the current defence (assuming that the adult in question is a parent or is in loco parentis).

The defence's abolition in relation to any form of corporal punishment, irrespective of the level of harm caused, will mean that all acts of battery captured by the definition in section 1 of the Bill will be unlawful. By extension, any action which involves the immediate apprehension of "corporal punishment" will be incapable of being defended in respect of an allegation of assault or of a trespass against the person. The interaction between, on the one hand, the abolition by statute of the defence in relation to a particular type of battery, and, on the other, the existing common law of assault achieves the correct result.

In other words, once the defence is abolished in relation to acts of battery constituting corporal punishment, it follows that an assault by way of a threat to carry out any degree of corporal punishment (which will be unlawful once the Bill is in force, irrespective of severity) cannot be defended in legal proceedings.

Implementation and training needs

"What assessment/discussions have taken place with CAFCASS about the anticipated impact of this Bill on their work and caseloads in terms of both private law and public law cases."

Officials have had regular discussions with Cafcass Cymru regarding the potential impact of the Bill on their work. Cafcass Cymru already responds to allegations made by separating couples within private law proceedings. This is a complex issue and professionals already make balanced decisions to ensure children are kept safe, and are able to maintain relationships with both parents where this is safe and in the child's best interests. The Bill does not change this.

There is no precedent in the UK for removing the defence and, therefore accurately predicting the impact is difficult. It is possible there will be an impact on caseloads, at least initially, due to increased public and professional awareness of the issue.

We will continue to work closely with Cafcass Cymru, to consider how we can monitor the impact of the Bill. A representative from Cafcass Cymru will be invited to be part of the Implementation Group which is meeting on 14 May. Work by the Group will help us develop monitoring and reporting processes for future evaluation of the impacts of the change in the law (if passed).

I recognise parental separation affects many children and their families. Where it is handled well, the adverse impact on children is minimised. In 2017, Welsh Government provided £32,000 to make the Cafcass Cymru Working Together for Children course more widely available to parents. The course helps parents understand how best to work together to support their children during and after separation.

"What assessment/discussions have taken place with representatives of the judiciary (civil, family and criminal)regarding the training needs and cross-border issues arising from the implementation of this Bill?"

Officials have met with representatives of Her Majesty's Courts & Tribunals Service (HMCTS) in July 2018 and a further meeting is planned in April 2019.

HMCTS colleagues highlighted the importance of engaging across the whole justice system and made a number of suggestions for engagement and awareness raising which will be considered through the work of the Implementation Group.

The Lord Chief Justice (LCJ) is responsible for arrangements for training the judiciary in England and Wales. These responsibilities are exercised through the Judicial College. The Welsh Government has a commitment to consult the LCJ and engage with his Judicial Office on proposals which bring changes to the criminal law or which may have an effect on the operation of the judiciary and the courts and tribunals system. As is the case with all Bills, the LCJ's Office have been kept informed of these proposals and are aware that the Bill has been introduced.

A representative from HMCTS has been invited to the Implementation Group which is meeting on 14 May and will consider potential training needs and cross-border issues.

"Please could you provide further details on:

The assessments undertaken in respect of the availability of Registered Intermediaries which para 28 of Annex 4 of the EM states 'must be considered for use at court in every case involving a child witness'."

"The reference in para 29 of Annex 4 of the EM to a current shortage of RIs 'and a very limited number of Welsh speaking ones' and that 'this could create delays in the process'."

The Registered Intermediaries (RI) scheme was the subject of a review by the Victims' Commissioner, Baroness Newlove. The review, 'A Voice for the Voiceless', which was published in January 2018 identifies a shortage of RIs to work in some geographical areas, such as North Wales and a lack of Welsh speaking RIs.

Written evidence on the RI scheme has also been provided to the Commission on Justice in Wales, which was set up by the former First Minister in September 2017 to review the operation of the justice system in Wales. Giving evidence to the Commission a RI identified, at the time of submitting his evidence (July 2018), that there was one full time Welsh speaking RI and two part time non Welsh Speaking RIs in Wales. He reported that the majority of intermediaries who work in Wales were traveling from England to conduct assessments and interviews.

Written evidence was also provided to the Commission on Justice in Wales in August 2018, by the Victims' Commissioner, Baroness Newlove. She reported that victims with communication needs can face a long wait to get access to a RI to help them give evidence with the police and for giving evidence at court.

Her Majesty's Courts and Tribunals Service and the Ministry of Justice carried out a recruitment exercise between October and December 2018 to recruit additional Registered Intermediaries. Fifteen candidates were successful and twelve have completed the approved assessed training course and will shortly be able to commence practising in the role of RI in Wales.

Guidance and training for frontline professionals (para 4.14-4.15 of the EM)

"Please could you provide a list of all relevant public policy and guidance in Wales which you have assessed as needing updating if the Bill passes, along with the date it was last updated"

"Please could you provide the estimated cost of updating: all Welsh Government guidance in respect of Social Care, Education (para 61 of Annex 4 of the EM), Health, Parenting, and third sector (para 8.19 of the EM)"

The updating of Welsh Government guidance is a routine activity which officials regularly undertake to ensure such guidance remains compliant with any changes to legislation or procedures. As such, we would expect this to be covered by administrative running costs, with little or no additional costs in this respect.

The Implementation Group will consider whether guidance provided by other public bodies needs updating. As we are not creating a new offence we expect existing guidance, across public bodies, to be updated, rather than produced from scratch. The organisations responsible for this guidance, for example the CPS or National College of Policing regularly update guidance to reflect changes in law and practice. We anticipate they would use existing resource to do this. In many cases guidance on the operation of the defence of reasonable punishment is only one aspect of broader guidance which covers a wide range of safeguarding or criminal justice issues. The CPS Charging Standard, for example, provides guidance to prosecutors and police officers in relation to a number of different offences against the person, of which the approach to the reasonable punishment defence in cases of common assault is only one part.

"Para 8.47 of the EM refers to the All Wales Child Protection Procedures 2002 being 'regularly updated'. Since the 2008 revision to these procedures, please could you indicate:

- ***how often it has been updated;***
- ***when it was last updated;***
- ***how long the updating work took;***
- ***the total costs of this work in terms of redrafting, dissemination, and training****."*

The All Wales Child Protection Procedures 2008 (AWCPP) were produced and adopted by all Safeguarding Children Boards in Wales. This is not Welsh Government guidance. The All Wales Child Protection Procedures Review group (now disbanded) was responsible for keeping the procedures up to date and added a number of protocols to the core procedures.

Currently the AWCPP and the Policy and Procedures for the Protection of Vulnerable adults (POVA) are being revised by Cardiff and the Vale Safeguarding Board on behalf of all Safeguarding Boards in Wales to take account of the Social Services and Well-being (Wales) Act 2014, which came in force 6 April 2016, and its accompanying statutory guidance. The work is overseen by a Project Board chaired by the Director of Social Services of the Vale of Glamorgan with representatives from

all Safeguarding Boards and partners. The intention is for the new Wales Safeguarding Procedures (WSP), which will replace both the AWCPP and the POVA procedures, to be launched in the autumn 2019.

The Welsh Government have also co-ordinated with stakeholders the production of a number of practice guides which replace existing AWCPP protocols for the safeguarding of children in specific circumstances, for example, in relation to child trafficking and children missing from home or care.

The WSP will be hosted by Social Care Wales (SCW) in a digital format which will enable ease of access, review and update. The Project Board is considering formal arrangements for keeping the WSP current and informed by changes to practice and guidance. This will be the responsibility of the Safeguarding Boards.

The current project is a substantial revision, rather than an update and was commenced in 2017. Funding of £185,000 to produce, digitalise and translate the Wales Safeguarding Procedures has been made available over the last two years. Additional funding for implementation and training resources will now be required. The Welsh Government has provided the funding for the review and agreement will be sought by the Welsh Government to provide funding for a launch and implementation. This includes SCW working with the Project Board to produce training materials for use by all Safeguarding Boards in Wales.

The Project Board have received a briefing on the Bill. As part of their work they will consider the consequent implications (should the Bill be passed) for updating the WSP as part of the sustainable arrangements made to keep the WSP current and informed by changes to practice, case law and guidance. The WSP Project Board members will be invited to contribute to the work of the Implementation Group.

"Please could you provide further information about the costs associated with social services workload arising from para 50 of Annex 4 of the EM. This states that there may 'be an increase in reporting incidents from individuals and community organisations such as schools' in line with the 'duty to report' in the Social Services and Well-being Act."

There is no precedent in the UK for removing the defence of reasonable punishment and, therefore, no requirement on public services to record or report incidents of physical punishment. There is therefore, no published or readily available data to use as a baseline or experience from another country to make a robust estimate of what the potential increase in social services referrals might be. As a consequence it is difficult to accurately predict the costs associated with a potential increase in workload for social services. As now, it is anticipated that, if the legislation is enacted, a significant proportion of incidents of physical punishment will not require a response under the child protection process.

We are working with a small number of local authorities to try to establish a sufficiently accurate baseline; however there are a number of issues associated with this. These were outlined in my letter to the Chair, Lynne Neagle AM on 5 April. One of the reasons why we are working to establish a baseline and will be putting in place

systems to better record cases is to enable us to look at resource requirements and understand cost implications.

There will be ongoing work, via the Implementation Group, with social services to establish a recording and monitoring system to develop a reliable system to collect relevant data for a period prior to implementation to establish baselines, and following commencement in order to monitor the impact of the Bill.

"What discussions have taken place with the Crown Prosecution Service regarding amending the Charging Standard for Offences Against the Person to ensure that Section 58 of the 2004 Children Act does not apply in Wales as per paragraph 3.23 of the Explanatory Memorandum? How much time will this revision take, how much is it expected to cost and who will be responsible for this cost?"

The former Minister for Children, Older People and Social Care, Huw Irranca-Davies met with the Chief Crown Prosecutor for Wales and CPS colleagues on 9 October 2018 and I met with them on 7 March 2019. Officials have also had regular contact with CPS colleagues during which there has been discussion on a range of issues including amending the Offences Against the Person Charging Standard.

The CPS is a non-devolved organisation which has a policy department that updates guidance documents as part of the work they are employed to do. Between July and August 2017 the CPS consulted on revisions to and amended its Charging Standard. This was done as part of their periodic refresh, to reflect a number of legal and social developments and to clarify aspects of the Standard. The amendments included clarification on the approach required where the defence of reasonable punishment falls for consideration. Changes to the application of the defence in Welsh legislation will again be reflected in updates to the CPS Charging Standard in line with CPS normal practice.

The CPS meets the costs incurred of reviewing and updating its legal guidance. Following discussions it is understood that, in line with their normal practice, the CPS will meet costs incurred in reviewing its Charging Standard to reflect legislation that ensures Section 58 of the 2004 Children Act does not apply in Wales.

"What discussions have taken place with the Police regarding the amended guidance referred to in para 15 of Annex 4 of the EM? How much time will this revision take, how much it is expected to cost and who will be responsible for this cost?"

"What discussions have taken place with the Police regarding the difference in recording requirements between England and Wales for the National Law Enforcement database referred to in paras 14 and 15 of Annex 4 of the EM? How has the feasibility of this work been assessed, how much is it expected to cost and who will be responsible for this cost?"

The former Minister for Children, Older People and Social Care, Huw Irranca-Davies met with the four Chief Constables (or their Deputies) of the four police forces in Wales on 3 August 2018 and I also met them on 24 January 2019. Officials have also had regular contact with representatives of the four police forces in Wales in which there has been discussion on a range of issues including guidance and recording requirements.

As explained at paragraph 14 of Annex 4 of the EM, the National Law Enforcement Database (LEDS) will be set up to replace both the existing Police National Database (PND) and Police National Computer (PNC). Currently, conviction information is held on the PNC, and records on non-conviction information (e.g. intelligence, non-statutory out of court disposals such as community resolutions) are held on the PND.

The need to consider how the LEDS will distinguish between the fact that certain common assaults on children may be non-conviction information in England and conviction information in Wales has been raised in our discussions with police as an issue to work through.

At this stage, our view is that there would be no difficulty in terms of accommodating this difference within a combined database which contains records about both conviction and non-conviction information. Removing the defence of reasonable punishment in Wales does not create a new offence; the offence of common assault already exists in common law across England and Wales, therefore it should be possible to report incidents of common assault against children, either as conviction information (e.g. if a caution has been accepted by the perpetrator) or as non-conviction information.

Clear guidance about the inputting of information to LEDS, so that there is clarity about whether cases of 'reasonable punishment' are recorded as conviction or non-conviction information will be essential. Once recorded, it should be clear to disclosure units which non-conviction information they should consider for release for the purpose of an enhanced Disclosure and Barring Service check.

We consider that any costs attached to such guidance would be minimal, and part of much wider guidance likely to be required regarding the inputting of information to LEDS. However, these are matters of detailed implementation which we will discuss further with the police and others as required.

"Please could you provide details of any costs associated with attending a course as part of a conditional caution referred to in para 21 of Annex 4 of the EM. Will a course need to be developed for this type of offence? If yes, who will be expected to develop and fund this course?"

"Please could you provide details of progress and costs associated with the community resolutions referred to in para 24 of Annex A of the EM?"

The former Minister for Children, Older People and Social Care, Huw Irranca-Davies met with the Police and Crime Commissioners on 29 October 2018 and I also met them on 24 January 2019. Officials have also had regular contact with the CPS and representatives of the four police forces in Wales in which there has been discussion on a range of issues including on out of court disposals.

Conditional cautions are issued by the police in accordance with Ministry of Justice guidelines. Decisions around the use of out of court disposals and the most appropriate conditions to attach to a caution are a non-devolved responsibility. We will continue to work with the Home Office, Ministry of Justice, CPS, Police and Police and Crime Commissioners to consider suitable interventions.

The way courses are funded varies between police forces. They are usually paid for through funding from the PCC; by the offender themselves, or are already available and funded in the community. It is possible that existing provision could be utilised. The Implementation Group, which will include representatives from key organisations, will consider the use of out of court disposals, including community resolutions and conditional cautions. Planning around implementation will also consider the most appropriate models of delivery, guidance, funding and resourcing arrangements.

Awareness raising campaign and costs (paras 3.63-3.66 of the EM).

"Please could you clarify the target audience for the awareness raising campaign."

The communications campaign will target the entire population of Wales as most people come into contact with children.

The audience will also be broken down and messages will be tailored for a number of different groups. We will carry out scoping work over the coming months to consider what messages resonate best with and the most effective ways to communicate with different groups.

The communications plan will include extensive engagement with stakeholders who are key to the implementation of the legislation, for example the police, Crown Prosecution Service, Disclosure and Barring Service, and frontline professionals and organisations who work with children and families including social services, health and education professionals.

"Please could you provide details of the methods and costs for awareness raising with visitors to Wales, how this will be delivered and the costs associated for this for 3 years (para 9.2 of the EM)?"

Work will be carried out during the passage of the Bill to establish the most effective methods of raising awareness with visitors to Wales. We recognise that citizens of Wales and visitors to our country should be able to find the law, and to understand it, with reasonable ease in advance so that they can enjoy the benefits, and respect the obligations, that the law confers or imposes on them.

"Please could you provide details of the assessment made as to whether to include this awareness raising campaign on the face of the Bill."

We have given careful and detailed consideration to the need to raise awareness of the change in the law, both prior to and after commencement, should the Bill achieve Royal Assent.

We commissioned a report by the Public Policy Institute for Wales (now the Wales Centre for Public Policy) on legislating to prohibit the physical punishment of children (https://www.wcpp.org.uk/publication/legislating-to-prohibit-parental-physical-punishment-of-children/), which considered the experience from other countries which have legislated in this area.

As highlighted at paragraph 8.24 to 8.25 of the Explanatory Memorandum, the report showed that a change in the law, accompanied by an awareness raising campaign and support for parents, can lead to a decline in physical punishment and a change in attitudes. It also found that where a change in the law is not accompanied by a publicity campaign, or a campaign is not sustained, knowledge of the law is less widespread.

We are therefore committed to running a sustained awareness raising campaign, and have confirmed this commitment in Chapter 8 of the Explanatory Memorandum.

A duty on Welsh Ministers to carry out an awareness raising campaign is not necessary in light of this firm commitment and the fact that Welsh Ministers already have sufficient powers to be able to raise awareness of the legislation.

Implementation group (para 8.9 of the EM)

"Please could you provide details of the role, membership and terms of reference for the implementation group and how often it has met to date, and an outline of the reasons why this information was not included in the Explanatory Memorandum"

The remit of the Implementation Group will be to consider and make recommendations about how to implement any changes required in most practical and effective way. I have invited representation from a wide range of stakeholders including the police, Police and Crime Commissioners, social services, and the public sector in Wales including health and education sectors. The first meeting has been arranged for 14 May 2019.

From previous engagement with stakeholders, we anticipate the workstreams could include: - advice, guidance, support and information for parents; data collection, monitoring and evaluation; operational processes, procedures, guidance and interaction between agencies; and out of court disposals, including possible diversionary schemes. The full range of work to be covered will be tested with the Implementation Group.

Other

"In relation to paragraph 3.42 of the EM, are you assured that all other academic references have been represented correctly?"

The overarching aim of the Bill is to help protect children's rights.

The intention was to provide a balanced summary of evidence in the consultation document and the Explanatory Memorandum, rather than provide a comprehensive academic review. The conclusions from our consultation document are broadly consistent with the findings set out in the Wales Centre for Public Policy (WCPP) report 'Parental Physical Punishment: Child Outcomes and Attitudes'. The WCPP report was an independent review of the available literature which had the findings peer reviewed by experts in the field. Officials have endeavoured to read and check all academic references which have been referred to in the Explanatory Memorandum and consultation document. To the best of our knowledge academic references have been represented correctly.

"Please could you provide more clarity about the published data referred to in para 8.20 of the EM in New Zealand in terms of cases reported to the police service before and after the law change."

The New Zealand legislation, The Crimes (Substituted Section 59) Amendment Act 2007, came into force on 22 June 2007. Its purpose was to abolish the use of parental force for the purpose of correction.

New Zealand police have published a number of reviews of the impact of the New Zealand legislation. The reviews are available at: https://www.police.govt.nz/about-us/publication/crimes-substituted-section-59-amendment-act-2007

The reviews were based on data collected by the New Zealand police, with a view to providing information on volumes of calls to police about child assaults involving 'smacking' and 'minor acts of physical discipline', as opposed to other child assaults.

In the period of three months prior to commencement of the legislation, and five years afterwards, the New Zealand police examined offences recorded under the following seven offence codes:

- Assault Child (Manually)
- Assault Child (Other Weapon)
- Common Assault (Domestic)(Manually)
- Common Assault (Manually)
- Other Assault on Child (Under 14 Years)
- Common Assault Domestic (Other Weapon)
- Other Common Assault #1649

The offences under these seven codes were examined for the purpose of the reviews, because they were considered to be the offence types most likely to include 'smacking' type incidents. The review reports indicate that the child assault events identified under these codes are not the total number of child assault events attended by the New Zealand police in any review period, as assault events which were not considered to be likely to include 'smacking' type incidents were not examined.

Based on this examination, the events recorded under each of these offences were allocated to one of each of the following categories: 'smacking', 'minor acts of physical discipline' and 'other child assault'.

The rationale used to allocate each event to one of these categories involved consideration of the:

- actual physical action used in the child assault; and
- the context and the surrounding circumstances.

We have summarised the data collected for each of the 12 review periods in the table below. The first review period of 17/03/2007 – 22/06/2007 is the three month period prior to commencement of the New Zealand Act:

New Zealand review of cases since enactment of Section 59

	Law passed											*Numbers of cases*
	Baseline Period	Review Period 1	Review Period 2	Review Period 3	Review Period 4	Review Period 5	Review Period 6	Review Period 7	Review Period 8	Review Period 9	Review Period 10	Review Period 11
	17/03/2007 - 22/06/2007	23/06/2007 - 28/09/2007	29/09/2007 - 04/04/2008	05/04/2008 - 03/10/2008	04/10/2008 - 04/04/2009	05/04/2009 - 23/06/2009	24/06/2009 - 22/12/2009	23/12/2009 - 22/06/2010	23/06/2010 - 21/12/2010	22/12/2010 - 21/06/2011	22/06/2011 - 21/12/2011	22/12/2011 - 21/06/2012
Smacking	3	3	13	9	8	3	11	25	18	18	23	12
Minor Acts of Physical Discipline	10	12	69	49	39	10	39	38	45	58	45	31
Other Child Assaults/No offence disclosed	82	96	206	200	232	114	318	353	381	380	432	312
Total	95	111	288	258	279	127	368	416	444	456	500	355

Note: Review periods vary in length and so are not directly comparable

Source: New Zealand Police

As we indicate in paragraph 8.20 of the Explanatory Memorandum, there are differences between the situations in New Zealand and Wales which must be borne in mind when comparing the two. Subject to the caveats listed at paragraph 8.34 and annex 6 of the Explanatory Memorandum, we have used the New Zealand data as a proxy to estimate the potential increase in reporting to the police and prosecutions in the courts.

In the case of the police, baseline data specific to Wales was identified through a retrospective audit carried out by the four police forces in Wales (see table on page 50 of the Explanatory Memorandum). The potential scale of increase was calculated by reference to the New Zealand data, on the basis that incidents categorised in New Zealand as 'smacking' or 'minor acts of physical discipline' would roughly equate to offences at the level of 'reasonable punishment' in Wales. The table at page 51 of the Explanatory Memorandum explains that, on average, such incidents occurred twice as frequently in the five years following commencement of the legislation in New Zealand. An average increase has been used as reporting periods in New Zealand were not uniform, so attempting to forecast on a year by year basis is complex.

In the case of the courts, the New Zealand data has been used as a proxy to provide an estimate of the potential numbers of cases prosecuted in Wales in the five years following commencement – again, bearing in mind the caveats around the differences between the situations in Wales and New Zealand. As explained at paragraphs 8.40 and 8.41 of the EM, the estimated number has been calculated on the basis that the number of 0-14 year olds in Wales is around 60% of the number of 0-14 year olds in New Zealand (the legislation in New Zealand applies to 0-14 year olds).

In the five years of the review period, there were eight prosecutions for 'smacking' and 55 for 'minor acts of physical discipline', so 63 prosecutions in total. We have, therefore, estimated 37 or 38 prosecutions over a five year period in Wales. This is explained further at pages 8-9 of the Justice Impact Assessment, where it is also noted that the incidence of prosecutions would likely start to decrease after 5 years as a result of the sustained awareness raising campaign planned by the Welsh Government.